

## DEPARTMENT OF STATE REVENUE

Revenue Ruling # 2015-13ST  
April 21, 2016

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## ISSUES

Sales and Use Tax - Exemptions Applicable to Sales of Food

Authority: [IC 6-2.5-2-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-5-20](#); [IC 6-9-33-4](#); Sales Tax Information Bulletin #11 (November 2011); Sales Tax Information Bulletin #29 (April 2016)

A company ("Taxpayer") is seeking a determination on the following issues regarding its bakery:

1. Whether its bakery products are exempt from Indiana gross retail and use tax and food and beverage tax as food or food ingredients.
2. Whether the application of sales tax and food and beverage tax differs based on the quantity of what is sold.

## STATEMENT OF FACTS

Taxpayer is an Indiana bakery located in Allen County that sells bagels, bread, cake, cookies, croissants, donuts, Danishes, muffins, pies, tarts, tortes, tortillas and like items. Taxpayer states that the items may be sold individually or by the dozen.

## DISCUSSION

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [IC 6-2.5-2-1\(a\)](#). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. [IC 6-2.5-2-1\(b\)](#). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." [IC 6-2.5-3-2\(a\)](#).

In general, all purchases of tangible personal property are subject to sales and/or use tax unless an enumerated exemption from sales and/or use tax is available. One such exemption is found in [IC 6-2.5-5-20\(a\)](#), which provides that the "[s]ales of food and food ingredients for human consumption are exempt from the state gross retail tax." The statute goes on to provide the following:

- (b) For purposes of this section, the term "food and food ingredients for human consumption" includes the following items if sold without eating utensils provided by the seller:
- (1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
  - (2) Food sold in an unheated state by weight or volume as a single item.
  - (3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.
- (c) Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food ingredients for human consumption" does not include:
- (1) candy;
  - (2) alcoholic beverages;
  - (3) soft drinks;
  - (4) **food sold through a vending machine;**
  - (5) **food sold in a heated state or heated by the seller;**
  - (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne

illnesses);

(7) **food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food);**

(8) tobacco; or

(9) dietary supplements.

**(Emphasis added).**

Therefore, if bakery items are sold by Taxpayer with utensils, in a heated state, or from a vending machine, sales of these bakery items would not fall under the food and food ingredient exemption and would be subject to sales and use tax.

Allen County has a supplemental food and beverage tax. [IC 6-9-33-4](#) provides that this tax "does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail tax imposed by [IC 6-2.5](#)." Consequently, food and food ingredients are eligible for an exemption from the Allen County supplemental food and beverage tax pursuant to [IC 6-2.5-5-20](#).

Sales Tax Information Bulletin #29 (April 2016) provides further clarification for what is meant by "food sold with eating utensils" in [IC 6-2.5-5-20](#) as follows:

(2) All food items sold with eating utensils provided by the seller. Eating utensils includes plates, knives, forks, spoons, glasses, cups, napkins, or straws (a plate does not include a container or packaging used to transport the food). **Except as provided below, food shall be considered to be sold with eating utensils provided by the seller when utensils are given to the purchaser or made available for self-service by the purchaser on the seller's premises.** The taxability of food sold by a restaurant or a combination business is determined as follows:

(a) A restaurant is a business that sells prepared food such as meals, sandwiches, or other food for consumption on or off the premises and which provides utensils. A business is considered a restaurant if seventy five percent (75%) or more of the business's sales are of prepared food, as determined by the formula in "Appendix B."

**Because utensils are provided by a restaurant, this subjects all food items ready for immediate consumption on or off the premises sold by the restaurant to tax, regardless of the portion size.**

This includes self-service food such as salad bars or drink islands, bakery items and other items normally considered non-taxable, including bottled water, fruit, and potato chips. However, food sold without eating utensils provided by the seller that ordinarily requires cooking (as opposed to just reheating) by the consumer prior to consumption is excluded from prepared food, and is, therefore, exempt (e.g., prepackaged baking mixes).

(b) A combination business is a business that has both an area that is considered a restaurant and an area that is considered a store, and the business's sales of prepared food are less than seventy five percent (75%) of the business's overall sales (i.e., grocery stores with a deli or cafeteria; convenience stores; farmer's markets; restaurants with a gift store or grocery), as determined by the formula in "Appendix B." Sales of prepared food by a combination business are taxable. **However, otherwise exempt food sold by a combination business, including bakery items and items ready for consumption at the time of sale, are only taxable if utensils are handed to the customer.** This includes utensils that are placed by the seller in a bag or other container that is handed to the customer.

**(Emphasis added).**

Sales Tax Information Bulletin #29 further provides that with regards to bakeries, "if a bakery provides utensils, the bakery items it sells would be subject to sales tax depending on whether the bakery qualifies as a restaurant or combination business using the test outlined in 'Appendix B.'" In other words, if Taxpayer qualifies as a "combination business," the bakery items would be taxable if utensils are handed to the customer, but if Taxpayer qualifies as a "restaurant," then the bakery items would be taxable simply by making utensils available or giving them to the customer. (The formula for calculating whether a business is a restaurant or a combination business is found in "Appendix B" of Sales Tax Information Bulletin #29).

Taxpayer refers to Sales Tax Information Bulletin #11 (November 2011), claiming that the following section

Sales through a grocery store, salad bar, bakery, or delicatessen and by restaurants, cafeterias, lunch counters, drive-ins, roadside ice cream and refreshment stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities of meals, sandwiches, hamburgers, hot dogs, french fries, fried chicken, fish and chips, pizza, potato salad, cole slaw, popcorn, sundaes, cones and cups of ice creams, milk shakes, soft drinks, and similar food and beverage items are taxable regardless of whether sold by such establishments for consumption on the premises or on a "take out" or "to-go" basis.

However, this section does not discuss the sale of "bakery items." This section discusses the sale of "prepared food," meaning food composed of two (2) or more food ingredients mixed or combined by the seller for sale as a single item, food sold in a heated state, or food sold with utensils. This term does not include "bakery items." This section of Sales Tax Information Bulletin #11 is saying that if a bakery sells prepared food, the prepared food would be subject to sales tax.

With regard to the second question of whether the application of sales tax and food and beverage tax differs depending on the quantity of what is sold, Taxpayer provides examples, such as buying three or fewer donuts, cookies, etc., compared to buying a dozen donuts, cookies, etc., or buying a whole cake as opposed to a slice. Simply put, Taxpayer asks whether a sale of more than one item packaged together would constitute an exempt "grocery item." In this context, bakery items, whether sold individually or in a package of two or more, are subject to the same rules as laid out above: they are exempt from sales and use tax and food and beverage tax, and only become taxable if they are sold with utensils, in a heated state, or from a vending machine. Further, with regards to utensils, the taxability of a package of two or more bakery items sold by Taxpayer depends on whether Taxpayer qualifies as a combination business or a restaurant. If Taxpayer qualifies as a "combination business," the bakery items would be taxable if the utensils are handed to the customer, but if Taxpayer qualifies as a "restaurant," then the bakery items would be taxable simply by making utensils available or giving them to the customer.

### **RULING**

1. Bakery items sold by Taxpayer are exempt from sales and use tax and food and beverage tax unless the bakery items are sold with utensils, in a heated state, or from a vending machine. For purposes of "selling with utensils," if Taxpayer qualifies as a "combination business," the bakery items would be taxable if the utensils are handed to the customer, but if Taxpayer qualifies as a "restaurant," then the bakery items would be taxable simply by making utensils available or giving them to the customer.
2. Taxpayer's sales of two or more bakery items packaged together are exempt from sales and use tax and food and beverage tax unless they are sold with utensils, in a heated state, or from a vending machine. If Taxpayer qualifies as a "combination business," the package of two or more bakery items would be taxable if the utensils are handed to the customer, but if Taxpayer qualifies as a "restaurant," then the bakery items would be taxable simply by making utensils available or giving them to the customer.

### **CAVEAT**

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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